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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 WAYNE HOLLOWAY,
12 CDCR# V-04793,

13 Plaintiff,

14
15 vs.
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17 JOHN MARSHALL, Warden; BONNIE
18 DUMANIS; PUBLIC DEFENDERS
19 OFFICE; COUNTY OF SAN DIEGO,

20 Defendants.
21

Civil No. 07-1696 WQH (WMc)

ORDER:

(1) **GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE AND GARNISHING
\$350.00 BALANCE FROM INMATES'S
TRUST ACCOUNT; and**

(2) **DISMISSING ACTION
WITHOUT PREJUDICE FOR
FAILING TO STATE A
CLAIM AND FOR SEEKING
MONETARY DAMAGES AGAINST
DEFENDANTS WHO ARE IMMUNE
PURSUANT TO
28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b)**

22 Plaintiff, a state inmate currently incarcerated at California Men's Colony located in San
23 Luis Obispo, California, proceeding pro se, has filed a civil rights Complaint pursuant to 42
24 U.S.C. § 1983. Plaintiff claims that his due process rights were violated in 1993 when Plaintiff
25 was excluded from the courtroom during the "readback of an adverse witness testimony" during
26 his state criminal proceeding. (Compl. at 3.)

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1 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead,
 2 he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a)
 3 [Doc. No. 4].

4 **I. Motion to Proceed IFP [Doc. No. 4]**

5 All parties instituting any civil action, suit or proceeding in a district court of the United
 6 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
 7 U.S.C. § 1914(a). An action may proceed despite a party’s failure to prepay the entire fee only
 8 if that party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
 9 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however,
 10 remain obligated to pay the entire fee in installments, regardless of whether their action is
 11 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
 12 (9th Cir. 2002).

13 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
 14 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
 15 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff’s trust account statement indicates
 16 that he has insufficient funds from which to pay filing fees at this time. *See* 28 U.S.C.
 17 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil
 18 action or appealing a civil action or criminal judgment for the reason that the prisoner has no
 19 assets and no means by which to pay the initial partial filing fee.”). Therefore, the Court
 20 **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No. 4] and assesses no initial partial filing
 21 fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fees mandated
 22 shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment
 23 provisions set forth in 28 U.S.C. § 1915(b)(1).

24 **II. Sua Sponte Screening Pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

25 Notwithstanding payment of any filing fee or portion thereof, the Prison Litigation
 26 Reform Act (“PLRA”) requires courts to review complaints filed by prisoners against officers
 27 or employees of governmental entities and dismiss those or any portion of those found frivolous,
 28 malicious, failing to state a claim upon which relief may be granted, or seeking monetary relief

1 from a defendant immune from such relief. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez*
2 *v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213
3 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

4 Prior to the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal of only
5 frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However 28 U.S.C.
6 §§ 1915(e)(2) and 1915A now mandate that the court reviewing a prisoner's suit make and rule
7 on its own motion to dismiss before directing that the complaint be served by the U.S. Marshal
8 pursuant to FED. R. CIV. P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits, but requires
9 a district court to dismiss an in forma pauperis complaint that fails to state a claim.”); *Barren v.*
10 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). The district court should grant leave to
11 amend, however, unless it determines that “the pleading could not possibly be cured by the
12 allegation of other facts” and if it appears “at all possible that the plaintiff can correct the
13 defect.” *Lopez*, 203 F.3d at 1130-31 (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.
14 1995); *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 701 (9th Cir. 1990)).

15 “[W]hen determining whether a complaint states a claim, a court must accept as true all
16 allegations of material fact and must construe those facts in the light most favorable to the
17 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
18 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). However, while liberal
19 construction is “particularly important in civil rights cases,” *Ferdik v. Bonzelet*, 963 F.2d 1258,
20 1261 (9th Cir. 1992), the court may nevertheless not “supply essential elements of the claim that
21 were not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268
22 (9th Cir. 1982).

23 As currently pleaded, it is clear that Plaintiff's Complaint fails to state a cognizable claim
24 under 42 U.S.C. § 1983. Section 1983 imposes two essential proof requirements upon a
25 claimant: (1) that a person acting under color of state law committed the conduct at issue, and
26 (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the
27 Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S.
28 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986);

1 *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

2 First, Plaintiff names as a Defendant, the Public Defenders Office for the County of San
 3 Diego. To the extent that Plaintiff is seeking to file a § 1983 action against the Public Defender
 4 who was appointed to represent him in his criminal action, his claim must be dismissed. A
 5 person “acts under color of state law [for purposes of § 1983] only when exercising power
 6 ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with
 7 the authority of state law.’” *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting
 8 *United States v. Classic*, 313 U.S. 299, 326 (1941)). Attorneys appointed to represent a criminal
 9 defendant during trial, do not generally act under color of state law because representing a client
 10 “is essentially a private function ... for which state office and authority are not needed.” *Polk*
 11 *County*, 454 U.S. at 319; *United States v. De Gross*, 960 F.2d 1433, 1442 n.12 (9th Cir. 1992).
 12 Thus, when publicly appointed counsel are performing as advocates, *i.e.*, meeting with clients,
 13 investigating possible defenses, presenting evidence at trial and arguing to the jury, they do not
 14 act under color of state law for section 1983 purposes. *See Georgia v. McCollum*, 505 U.S. 42,
 15 53 (1992); *Polk County*, 454 U.S. at 320-25; *Miranda v. Clark County*, 319 F.3d 465, 468 (9th
 16 Cir. 2003) (en banc) (finding that public defender was not a state actor subject to suit under
 17 § 1983 because, so long as he performs a traditional role of an attorney for a client, “his
 18 function,” no matter how ineffective, is “to represent his client, not the interests of the state or
 19 county.”).

20 Accordingly, Plaintiff’s claims against the Public Defenders Office must be dismissed
 21 for failing to state a claim upon which section 1983 relief may be granted. *See* 28 U.S.C.
 22 § 1915(e)(2)(B)(ii) & 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

23 Moreover, to the extent Plaintiff seeks damages under 42 U.S.C. § 1983 based on the
 24 alleged ineffectiveness assistance of his trial counsel, his claim amounts to an attack on the
 25 validity of his underlying criminal proceedings, and as such, is not cognizable under 42 U.S.C.
 26 § 1983 unless and until he can show that conviction has already been invalidated. *Heck v.*
 27 *Humphrey*, 512 U.S. 477, 486-87 (1994); *Ramirez v. Galaza*, 334 F.3d 850, 855-56 (9th Cir.
 28 2003) (“Absent such a showing, [e]ven a prisoner who has fully exhausted available state

remedies has no cause of action under § 1983....”) (quoting *Heck*, 512 U.S. at 489), *cert. denied*, 124 S. Ct. 2388 (2004). *Heck* holds that “in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a section 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.” *Heck*, 512 U.S. at 486-87. A claim challenging the legality of a conviction or sentence that has not been so invalidated is not cognizable under § 1983. *Id.* at 487; *Edwards v. Balisok*, 520 U.S. 641, 643 (1997).

In *Heck*, the Supreme Court held that:

when a state prisoner seeks damages in a section 1983 suit, the district court must consider *whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence*; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff’s action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.

Heck, 512 U.S. at 487 (emphasis added). An action that is barred by *Heck* should be dismissed for failure to state a claim without prejudice to Plaintiff’s right to file a new action if he succeeds in invalidating his conviction. *Edwards*, 520 U.S. at 649.

Here, Plaintiff’s ineffective assistance of counsel claims against his criminal defense appointed counsel “necessarily imply the invalidity” of his criminal proceedings and continuing incarceration. *Heck*, 512 U.S. at 487. Were Plaintiff to succeed in showing that the Deputy Public Defender appointed to represent him rendered ineffective assistance of counsel, an award of damages would “necessarily imply the invalidity” of his conviction. *Id.*; *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984) (to succeed on ineffective assistance claim petitioner must show that counsel’s performance fell below objective standard of reasonableness and that but for counsel’s errors the result of the trial would have been different); *Lozada v. Deeds*, 964 F.2d 956, 958-59 (9th Cir. 1992) (remedy for ineffective assistance of counsel is a conditional writ granting petitioner’s release unless state retries him or allows him to pursue an appeal with

1 the assistance of counsel within a reasonable time). Thus, because Plaintiff seeks damages for
 2 an allegedly unconstitutional criminal proceedings in a San Diego Superior Court criminal case,
 3 and because he has not alleged that his conviction has already been invalidated, a section 1983
 4 claim for damages has not yet accrued. *See Heck*, 512 U.S. at 489-90.

5 However, even if Plaintiff could show that the criminal convictions upon which his claims
 6 are based have already been terminated in his favor, his Complaint still must be dismissed
 7 pursuant to 28 U.S.C. § 1915(e)(2) to the extent it seeks monetary damages against District
 8 Attorney Bonnie Dumanis. Criminal prosecutors are absolutely immune from civil damages
 9 suits premised upon acts committed within the scope of their official duties which are
 10 “intimately associated with the judicial phase of the criminal process.” *Imbler v. Pachtman*, 424
 11 U.S. 409, 430 (1976); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 272-73 (1993); *Burns v.*
 12 *Reed*, 500 U.S. 478, 487-93 (1991). A prosecutor is immune even when the prosecutor’s
 13 malicious or dishonest action deprived the defendant of his or her liberty. *Ashelman v. Pope*,
 14 793 F.2d 1072, 1075 (9th Cir. 1986).

15 Thus, Plaintiff’s claims against Defendant Dumanis are dismissed pursuant to 28 U.S.C.
 16 § 1915(e)(2)(B)(iii) for seeking monetary relief against a defendant who is immune from such
 17 relief.

18 Finally, it appears from the face of Plaintiff’s Complaint that his claims are barred by the
 19 applicable statute of limitations. All of Plaintiff’s factual allegations appear to arise from events
 20 that occurred during his criminal trial in 1993. (*See Compl.* at 3-4.) While Congress has
 21 provided no federal statute of limitations governing section 1983 claims, the Supreme Court has
 22 held that federal courts should use the forum state’s single most appropriate statute of limitations
 23 applicable to personal injury actions for all section 1983 claims. *See Wilson v. Garcia*, 471 U.S.
 24 261, 269 (1985). Relying on *Wilson*, the Ninth Circuit has found that the one-year statute of
 25 limitations of California Code of Civil Procedure § 340(3)¹ is the most appropriate. *Usher v.*

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 27 ¹ California Code of Civil Procedure § 340(3) provides a one-year statute of limitations on any
 28 civil action for “[l]ibel, slander, assault, battery, false imprisonment, seduction, injury or death from
 wrongful act or neglect . . .” CAL. CIV. PROC. CODE § 340(3). On January 1, 2003, this code section
 was replaced with § 335.1 which now provides for a two-year statute of limitations for these actions.
 However, the longer period found in § 335.1 is inapplicable to Plaintiff’s action. *See Maldonado v.*

1 *City of Los Angeles*, 828 F.2d 556, 558 (9th Cir. 1987); *Trimble v. City of Santa Rosa*, 49 F.3d
 2 583, 585 (9th Cir. 1995) (per curiam). Federal law, however, determines when a section 1983
 3 cause of action accrues. *Hardin v. Staub*, 490 U.S. 536, 543-44 (1989). Under federal law, a
 4 claim generally accrues when the plaintiff “knows or has reason to know of the injury which
 5 is the basis of the action.” *Elliot v. City of Union City*, 25 F.3d 800, 802 (9th Cir. 1996)
 6 (internal citations omitted).

7 Plaintiff alleges that his constitutional rights were violated during his state criminal trial
 8 in 1993. (See Compl. at 3-4.) Thus, at the latest, Plaintiff’s claims arose in 1993. However,
 9 Plaintiff filed this action on August 27, 2007, over fourteen years after he claims that Defendants
 10 violated his constitutional rights.

11 Plaintiff does not allege any facts to suggest how or why California’s one-year statute
 12 of limitations might be tolled for a period of time which would make his claims timely. See,
 13 e.g., CAL. CODE CIV. P. § 352.1 (tolling statute of limitations “for a maximum of 2 years” during
 14 a prisoner’s incarceration); *Fink v. Shedler*, 192 F.3d 911, 916 (9th Cir. 1999) (finding that CAL.
 15 CODE CIV. P. § 352.1 tolls a California prisoner’s personal injury claims accruing before January
 16 1, 1995 for two years, or until January 1, 1995, whichever occurs later, unless application of the
 17 statute would result in a “manifest injustice.”). Due to Plaintiff’s incarceration, pursuant to *Fink*,
 18 Plaintiff’s claims against Defendants, accruing in 1993, would be tolled for two years.
 19 California’s one-year statute of limitations would then begin to run -- requiring Plaintiff to file
 20 this action against these Defendants no later than sometime in 1996. However, Plaintiff’s
 21 Complaint was not filed until August 27, 2007.

22 Generally, federal courts also apply the forum state’s law regarding equitable tolling.
 23 *Fink*, 192 F.3d at 914; *Bacon v. City of Los Angeles*, 843 F.2d 372, 374 (9th Cir. 1988). Under
 24 California law, however, a plaintiff must meet three conditions to equitably toll a statute of
 25 limitations: (1) he must have diligently pursued his claim; (2) his situation must be the product
 26 of forces beyond his control; and (3) the defendants must not be prejudiced by the application

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 28 *Harris*, 370 F.3d 945, 955 (9th Cir. 2004) (holding that under California law, an extension of a statute
 of limitations will not apply to claims already barred under the prior statute of limitations unless the
 Legislature explicitly provides for such an extension).

1 of equitable tolling. *See Hull v. Central Pathology Serv. Med. Clinic*, 28 Cal. App. 4th 1328,
 2 1335 (Cal. Ct. App. 1994); *Addison v. State of California*, 21 Cal.3d 313, 316-17 (Cal. 1978);
 3 *Fink*, 192 F.3d at 916. Here, however, Plaintiff has failed to plead any facts which, if proved,
 4 would support the equitable tolling of his claims. *See Cervantes v. City of San Diego*, 5 F.3d
 5 1273, 1277 (9th Cir. 1993).

6 Accordingly, the Court finds that Plaintiff's Complaint must be **DISMISSED** for failing
 7 to state a claim upon which relief can be granted and for seeking monetary damages against
 8 immune defendants pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A. Because it does not appear
 9 "at all possible that the plaintiff can correct the defect(s)" of his pleading, further leave to amend
 10 is **DENIED** as futile. *See Lopez*, 203 F.3d at 1130-31; *Cahill*, 80 F.3d at 339.

11 **III. Conclusion and Order**

12 Good cause appearing, **IT IS HEREBY ORDERED:**

13 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 4] is
 14 **GRANTED.**

15 2. The Secretary of California Department of Corrections and Rehabilitation, or his
 16 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
 17 owed in this case by collecting monthly payments from the account in an amount equal to twenty
 18 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
 19 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
 20 ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
 21 ASSIGNED TO THIS ACTION.

22 3. The Clerk of the Court is directed to serve a copy of this Order on James Tilton,
 23 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
 24 Sacramento, California 95814.

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